

Page 1

1

UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 05-44481-rdd

## 6 | In the Matter of:

7

8 DPH HOLDINGS CORP., ET AL.,

9

10 | Reorganized Debtors.

11

1 2 | - x

13

14 U.S. Bankruptcy Court

15 | 300 Quarropas Street

16 White Plains, New York

17

18 | November 18, 2010

19 | 10 : 46 AM

20

21 B E F O R E :

22 HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

24

25

Page 2

1 Motion of the VEBA Committee for the Delphi Salaried Retirees  
2 Association Benefit Trust Pursuant to 11 U.S.C. Section 105 and  
3 the Salaried OPEB Settlement Order to (I) Compel the Official  
4 Committee of Eligible Salaried Retirees to File its Final  
5 Report with the Court Pursuant to the Terms of the Salaried  
6 OPEB Settlement Order and, (II) to Direct the Office of the  
7 United States Trustee to Disband the Official Committee of  
8 Eligible Salaried Retirees

9

10 Motion by David Armstrong to Deem Claim for Administrative  
11 Expense Timely Filed Pursuant to Fed. R. Bankr. P. 9006(b) and  
12 11 U.S.C. Section 503(b)

13

14 Reorganized Debtors' motion for Order Resolving Outstanding  
15 Objections to Cure of Material Supply Agreements and Cure  
16 Proposals for Certain Executory Contracts and Unexpired Leases

17

18 Notice of Motion of Johnson Controls Inc. Power Solutions and  
19 Johnson Controls Battery Group, Inc. for an Order Compelling  
20 DPH Holdings to Comply with the Transfer Agreement Relating to  
21 Transfer of Delphi's New Brunswick Battery Facility to Johnson  
22 Controls, Inc., for Adequate Assurance of Financial Ability to  
23 Perform under Transfer Agreement, and in the Alternative, for  
24 Leave to Take 2004 Examination of DPH Holdings Corp. and for  
25 Other Relief

Page 3

1  
2 Sufficiency Hearing Regarding Claim of ATEL Leasing Corporation  
3 as Objected to on the Reorganized Debtors' Forty-Sixth Omnibus  
4 Objection Pursuant to 11 U.S.C. Section 503(b) and Fed. R.  
5 Bankr. P. 3007 to (I) Disallow and Expunge Certain  
6 Administrative Expense (A) Books and Records Claims, (B)  
7 Methode Electronics Claims, (C) State Workers' Compensation  
8 Claims, (D) Duplicate State Workers' Compensation Claims, (E)  
9 Workers' Compensation Claims, (F) Transferred Workers'  
10 Compensation Claims, (G) Tax Claims, (H) Duplicate Insurance  
11 Claims, and (I) Severance Claims, (II) Disallow and Expunge (A)  
12 A Certain Duplicate Workers' Compensation Claim, (B) a Certain  
13 Duplicate Tax Claim, and (C) a Certain Duplicate Severance  
14 Claim, (III) Modify Certain Administrative Expense (A) State  
15 Workers' Compensation Claims and (B) Workers' Compensation  
16 Claims, and (IV) Allow Certain Administrative Expense Severance  
17 Claims.

18  
19 Sufficiency Hearing Regarding Administrative Expense Motion of  
20 ATEL Leasing Corporation as Objected to on the Reorganized  
21 Debtors' Forty-Eighth Omnibus Objection Pursuant to 11 U.S.C.  
22 Section 503(b) and Fed. R. Bankr. P. 3007 to Disallow and  
23 Expunge (A) Certain Books and Records Claims and (B) Certain  
24 Duplicate Claims Asserted in Motions or Requests for Payment of  
25 Administrative Expense

Page 4

1  
2 Sufficiency Hearing Regarding Claim Filled by the Mississippi  
3 Workers' Compensation Individual Self-Insurer Guaranty  
4 Association on Behalf of Kaaren D. Washington as Objected to on  
5 the Reorganized Debtors' Forty-Sixth Omnibus Objection Pursuant  
6 to 11 U.S.C. Section 503(b) and Fed. R. Bankr. P. 3007 to (I)  
7 Disallow and Expunge Certain Administrative Expense (A) Books  
8 and Records Claims, (B) Methode Electronics Claims, (C) State  
9 Workers' Compensation Claims, (D) Duplicate State Workers'  
10 Compensation Claims, (E) Workers' Compensation Claims, (F)  
11 Transferred Workers' Compensation Claims, (G) Tax Claims, (H)  
12 Duplicate Insurance Claims, and (I) Severance Claims, (II)  
13 Disallow and Expunge (A) A Certain Duplicate Workers'  
14 Compensation Claim, (B) a Certain Duplicate Tax Claim, and (C)  
15 a Certain Duplicate Severance Claim, (III) Modify Certain  
16 Administrative Expense (A) State Workers' Compensation Claims  
17 and (B) Workers' Compensation Claims, and (IV) Allow Certain  
18 Administrative Expense Severance Claims

19

20

21

22

23

24

25 Transcribed by: Dena Page

Page 5

1

2 A P P E A R A N C E S :

3 SKADDEN ARPS SLATE MEAGHER & FLOM, LLP

4 Attorneys for Debtors

5 155 N. Wacker Drive

6 Chicago, IL 60606

7

8 BY: CARL T. TULLSON, ESQ.

9 RON E. MEISLER, ESQ.

10 JOHN K. LYONS, ESQ. (TELEPHONICALLY)

11

12

13 BARNES & THORNBERG LLP

14 Attorneys for Johnson Controls and Johnson Controls

15 Battery Group, Inc.

16 Suite 4400

17 One North Wacker Drive

18 Chicago, IL 60606

19

20 BY: DEBORAH L. THORNE, ESQ.

21

22

23

24

25

Page 6

1 BUCHANAN, INGERSOLL & ROONEY, PC  
2 Attorneys for ATEL Leasing  
3 50 South 16th Street  
4 Suite 3200  
5 Philadelphia, PA 19102  
6

7 BY: MARK PFEIFFER, ESQ. (TELEPHONICALLY)  
8  
9

10 DELPHI AUTOMOTIVE, LLP  
11 Attorneys for Debtors  
12 5725 Delphi Drive  
13 Troy, MI 48098  
14

15 BY: MARK HESTER, ESQ. (TELEPHONICALLY)  
16  
17

18 FARELLA BRAUN + MARTEL LLP  
19 Attorneys for Official Committee of Eligible  
20 Salaried Retirees  
21 235 Montgomery Street  
22 17th floor  
23 San Francisco, CA 94104  
24

25 BY: DEAN M. GLOSTER, ESQ. (TELEPHONICALLY)

Page 7

1

2 KRIEG DEVAULT LLP

3 Attorneys for VEBA Committee

4 One Indiana Square

5 Suite 2800

6 Indianapolis, IN 46204

7

8 BY: PATRICIA L. BEATY, ESQ. (TELEPHONICALLY)

9

10

11 PEPPER HAMILTON LLP

12 Attorneys for Creditor, David Armstrong

13 3000 Two Logan Square

14 Eighteenth and Arch Streets

15 Philadelphia, PA 19103

16

17 BY: NINA M. VARUGHESE, ESQ. (TELEPHONICALLY)

18

19

20 SATTERLEE STEPHENS BURKE & BURKE LLP

21 Attorneys for VEBA Committee

22 230 Park Avenue

23 New York, NY 10169

24

25 BY: TIMOTHY T. BROCK, ESQ.

1 P R O C E E D I N G S

2 THE COURT: All right, DPH Holdings.

3 So, you all got to see what we do on nonomnibus days.

4 Somehow this got mixed up from the 16th to the 18th. That's  
5 why you're here today instead of on an omnibus day, I guess.

6 MR. TULLSON: You know what, Your Honor --

7 THE COURT: Anyway, it's fine.

8 MR. TULLSON: -- I'm not aware.

9 THE COURT: All right. In any event, we're here on  
10 both -- well, on the omnibus as well as the claims omnibus day.

11 MR. TULLSON: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. TULLSON: Good morning. Carl Tullson, Skadden  
14 Arps here on behalf of the reorganized debtors. With your  
15 permission, we'd like to proceed with the claims hearing first.

16 THE COURT: Well, can we -- I have people here in  
17 connection with the retiree matter, and I just thought we could  
18 get that out of the way since they've reached an agreement at  
19 this point and I just want to --

20 MR. TULLSON: Sure.

21 THE COURT: -- deal with that --

22 MR. TULLSON: Okay.

23 THE COURT: -- and be done with that, if we can.

24 MR. TULLSON: Handle that matter first and then go  
25 back?

1 THE COURT: Because the other matters may take some  
2 more time.

3 MR. TULLSON: Okay.

4 THE COURT: I know there are two contested matters on  
5 the claims side.

6 MR. TULLSON: Yes. That's right.

7 THE COURT: Okay.

8 MR. TULLSON: So on the omnibus hearing, the first  
9 matter on the agenda was Wiegel Tool Works. That matter has  
10 been adjourned. The second matter has been settled. The  
11 reorganized debtors' motion to enforce the plan injunction  
12 against FKMT. There was a stipulation entered.

13 THE COURT: Right.

14 MR. TULLSON: And then the third matter on the agenda  
15 was the cure-related motion. I'm happy to --

16 THE COURT: Let's deal with that.

17 MR. TULLSON: -- have VEBA address that first.

18 THE COURT: Yeah.

19 MR. TULLSON: And then we'll come back to that later?

20 THE COURT: Let's come back to that.

21 MR. TULLSON: Thank you.

22 MR. BROCK: Thank you very much, Your Honor. Timothy  
23 Brock from Satterlee Stephens Burke & Burke --

24 THE COURT: Right.

25 MR. BROCK: -- on behalf of the VEBA trustees who I

Page 10

1 refer to as the VEBA committee.

2 THE COURT: Right.

3 MR. BROCK: My co-counsel, Patricia Beaty from the  
4 Krieg Devault firm in Indianapolis is on the phone. I believe  
5 that Mr. Gloster's on the phone, as well.

6 THE COURT: Is that right?

7 MR. GLOSTER: Good morning, Your Honor. Dean Gloster  
8 on behalf of the 1114 Salaried Retiree Committee.

9 THE COURT: Okay. And Ms. Beaty?

10 MS. BEATY: Good morning, Your Honor. Patricia Beaty  
11 on behalf of the VEBA committee.

12 THE COURT: Good morning. I saw the letters or the e-  
13 mails from the parties saying that they reached an agreement,  
14 and I've seen the agreement. I don't have any further issues  
15 with it.

16 MR. BROCK: That's great, Your Honor. The -- we've  
17 attached the true and correct copy of the modified amended  
18 trust agreement to the pleading I filed, and Mr. Gloster filed  
19 a copy with -- that's marked to show the changes.

20 THE COURT: Right.

21 MR. BROCK: So if the Court has no concerns with that,  
22 I'd like to just address briefly something that Mr. Gloster has  
23 raised in his document.

24 THE COURT: Right.

25 MR. BROCK: This is a joint request; we're

Page 11

1 cooperating. On the motion that Mr. Gloster, on behalf of the  
2 1114 committee wants to file, that motion is described, and I  
3 would leave it to Mr. Gloster to describe it further, if that's  
4 necessary. But we -- in this application, Mr. Gloster has  
5 indicated he'd like to have it heard at the next omnibus  
6 hearing.

7 THE COURT: Right, and this is the request to have the  
8 committee join in on getting a letter ruling from the IRS, I  
9 guess?

10 MR. GLOSTER: Your Honor, the -- Dean Gloster of  
11 Farella Braun + Martel. The issue is that the provisions of  
12 the American Recovery and Reinvestment Act expire at the end of  
13 this year if not extended by Congress.

14 THE COURT: Right.

15 MR. GLOSTER: Congress is still working on the  
16 extension, but there is a risk that the benefit subsidy will  
17 terminate, and the IRS has now sent letters to the participants  
18 indicating that their subsidy will terminate at the end of  
19 January which creates a live controversy. The VEBA has  
20 indicated that it wishes to obtain a private letter ruling in  
21 order to continue the subsidy for the benefits. It would  
22 assist the VEBA board in obtaining that if we got a designation  
23 that the VEBA benefits were in lieu of COBRA continuation  
24 coverage. And there is some history there. They essentially  
25 are, because the 1114 committee chose not to create a large

Page 12

1 fight with Delphi over that issue.

2 THE COURT: So the -- all that sounded fine to me.

3 The only -- the question I had is what relief do you need from  
4 me in connection with that?

5 MR. GLOSTER: Your Honor, we would sit down and  
6 cooperate with the debtor, agree with them on a form of order,  
7 and then specify on behalf of the retirees that the 1114  
8 committee agrees that the VEBA benefit is to be designated in  
9 lieu of any lifetime COBRA that the salaried retirees could  
10 have attempted to insist on under certain provisions of the  
11 COBRA statute. And then --

12 THE COURT: So you'd be looking for me to so order a  
13 stipulation, in essence?

14 MR. GLOSTER: Yes, Your Honor. So essentially it  
15 would be a settlement between the 1114 committee and the debtor  
16 on behalf of the salaried retirees that the 1114 committee  
17 represents that would provide clarity on that issue, and it  
18 would also give the VEBA board an additional means by which  
19 to --

20 THE COURT: To request this --

21 MR. GLOSTER: -- obtain a private letter ruling.

22 THE COURT: Right, okay. All right, well, I'm  
23 amenable to having that be scheduled, although you could also  
24 do it by notice of presentment, if it's a stipulation.

25 MR. BROCK: That's exactly what I was going to ask the

Page 13

1 Court, whether we could --

2 THE COURT: Yeah.

3 MR. BROCK: -- do that by notice of presentment. I've  
4 discussed it with debtors' counsel before today's hearing, and  
5 I think the request is that we allow for objections to be filed  
6 up until seven days before the next omnibus hearing, and if  
7 none are received, the Court could enter the order.

8 THE COURT: That's -- I'm happy to proceed that way.

9 MR. BROCK: Time is very important, Your Honor.

10 THE COURT: That's fine.

11 MR. BROCK: Okay.

12 THE COURT: And then, I guess, that would be the last  
13 act of the committee, and then you can submit the order  
14 disbanding the committee. That was originally sought as part  
15 of this.

16 MR. BROCK: That's correct, Your Honor.

17 MR. GLOSTER: Yes, Your Honor, and the committee has  
18 no objection to being disbanded.

19 THE COURT: Okay, so I'll look for that order at the  
20 same time that you e-mail chambers with the proposed  
21 stipulation for entry.

22 MR. BROCK: Okay, thank you very much, Your Honor.

23 THE COURT: All right, thank you.

24 MS. BEATY: Thank you, Your Honor.

25 MR. GLOSTER: Thank you, Your Honor.

Page 14

1                   THE COURT: Okay, all right. I think that's it for  
2 the -- well, we're going to deal with the cure claim issue  
3 next, I guess. But there's nothing else on the nonclaims  
4 omnibus agenda?

5                   MR. TULLSON: No, Your Honor. There's the motion of  
6 JCI.

7                   THE COURT: I guess that kind of fits in between, too.  
8 Okay.

9                   MR. TULLSON: And there's also the motion for leave to  
10 file late claim filed by David Armstrong.

11                  THE COURT: But that's agreed, right?

12                  MR. TULLSON: That's agreed, and we've reached an  
13 agreement with counsel for David Armstrong regarding language  
14 adjourning the objection of the claims procedures, which will  
15 be in the proposed order submitted to chambers.

16                  THE COURT: All right, so I have no problem with that  
17 resolution of that Pioneer motion.

18                  MR. TULLSON: Thank you, Your Honor.

19                  THE COURT: Okay.

20                  MR. TULLSON: So back to item 3 of the agenda, the 8.2  
21 and 8.2(b) cure-related motion, we filed a motion at docket  
22 number 20761. By this motion, the reorganized debtors request  
23 the Court enter an order overruling four objections to the cure  
24 amount notices and denying, now, two cure proposals. It went  
25 from three to two, Your Honor, because since the motion was

Page 15

1 filed, Spartech filed a notice of withdrawal at docket number  
2 20780 consistent with our representation of the motion that the  
3 matter had been settled in principle. And that withdrawal was  
4 filed on the basis of the representation that all of the  
5 contracts contained in the cure proposal were either post-  
6 petition or expired.

7 THE COURT: Okay.

8 MR. TULLSON: And accordingly, Spartech would not be  
9 included in the proposed order. Your Honor, the motion is  
10 uncontested, but I'm happy to answer any questions you may  
11 have.

12 THE COURT: No, I don't have any. Based on the  
13 averments in the motion and the uncontested nature of the  
14 relief that you're now seeking and the resolution of the  
15 Spartech aspect of it, I will grant the relief.

16 MR. TULLSON: Thank you, Your Honor. We'll submit an  
17 order to chambers.

18 THE COURT: Okay.

19 MR. TULLSON: At this point, I'll turn it over to my  
20 colleague, Ron Meisler, to address the JCI.

21 MR. MEISLER: Your Honor, in turn, I'm actually going  
22 to turn the podium over to counsel for JCI. This is, just for  
23 Your Honor's benefit, this is a bit of an alphabet soup.  
24 You've got JCI, Johnson Controls, we have DPH, which is, of  
25 course you know, DPH Holdings. We've got DEP, which is the New

Page 16

1 Jersey Department of Environmental Protection, and then  
2 finally, we have the LSRP, which is the Licensed Site  
3 Remediation Professional

4 THE COURT: Right.

5 MR. MEISLER: With that, Your Honor, I turn the podium  
6 over to counsel to JCI.

7 THE COURT: Is there an LSRP?

8 MR. MEISLER: That's in process, Your Honor.

9 THE COURT: Okay.

10 MR. MEISLER: We expect that -- we have the candidate  
11 for LSRP selected, and we expect that early in the first  
12 quarter of 2011, so the next sixty days or so, that we'll have  
13 engaged the LSRP. Keep in mind, Your Honor, that the deadline  
14 set by DEP to engage the LSRP is May 2012, so we're expecting  
15 to be something of the nature of sixteen to seventeen months in  
16 advance of that deadline.

17 THE COURT: Okay.

18 MS. THORNE: Your Honor, Deborah Thorne from Barnes &  
19 Thornburg on behalf of Johnson Controls, Inc. and Johnson  
20 Controls Battery Group, Inc., and I'll refer to my client as  
21 JCI. I think that might make it easier.

22 THE COURT: Okay.

23 MS. THORNE: I'm very happy to hear that the LSRP is  
24 in the works because that is news to Johnson Controls. Our  
25 motion, today, is to seek adequate assurance that DPH Holdings

Page 17

1 can really perform and not so much perform, but that they have  
2 the financial resources to perform under the transfer agreement  
3 which Your Honor approved in May of 2006 and at the same time a  
4 remediation agreement that Delphi signed with the State of New  
5 Jersey.

6 And before I go on, I don't know if Robert Frank from  
7 Reed Smith is on the phone. He's my co-counsel in  
8 environmental matters.

9 THE COURT: I don't think he is.

10 MS. THORNE: Okay, well, then, I'll proceed.

11 THE COURT: No, I'm looking at the CourtCall roster  
12 and he's not listed on it.

13 MS. THORNE: Okay, well, I'll proceed without him. As  
14 you may recall, although there have been thousands of documents  
15 in this case, there was a transfer agreement back in May of  
16 2006 when Johnson Controls purchased the New Brunswick Battery  
17 manufacturing facility where acid -- lead acid batteries had  
18 been manufactured for many years. And at the time that  
19 agreement was entered into, under the New Jersey regulations  
20 and under the Industrial Site Remediation Act, or known as  
21 ISRA, Delphi agreed to remediate that property in the future.  
22 It had, really, two choices at the time. Either it couldn't  
23 sell it until it remediated it or it could sign a remediation  
24 agreement agreeing to remediate it in the future, and it chose  
25 the latter. Johnson Controls purchased the property pursuant

Page 18

1 to the court order that was entered in this case and proceeded  
2 to hold that property and still does. Part of the transfer  
3 agreement that was entered at the time obligated Delphi to  
4 abide by New Jersey environmental laws and to ultimately  
5 remediate that property. As protection for Johnson Controls,  
6 there was an indemnification that was entered at the time  
7 indemnifying Johnson Controls in the case that Delphi was  
8 unable or did not remediate the property.

9                 Although this motion has been characterized by Delphi  
10 or DPH as a ploy on Johnson Controls' part to somehow jump to  
11 the head of the line on administrative claims, it's really not  
12 that. Our administrative claim is far more than -- it has  
13 additional damages that we've asserted, and we understand that  
14 in due course under the procedural order that this Court  
15 entered, although we were not party of that order and were  
16 never given notice of it, but that our number will come up  
17 someday, and someday, our claim will be dealt with.

18                 Meantime, we're very concerned that at the time that's  
19 dealt with or if there is, actually, a remediation, that there  
20 actually be sufficient funds in place so that we can be  
21 protected and so that the land can be remediated. And that's  
22 really our fear, is that there won't be sufficient funds.  
23 We've met with Delphi or with DPH Holdings, with John Brooks,  
24 the president of DPH, last summer and point-blank asked him  
25 what assets DPH Holdings had to ensure that they could

Page 19

1 financially continue on and effect the remediation, and we were  
2 told it was none of our business. That, in large part,  
3 prompted the motion that we filed because we do feel that it's  
4 important that we know that there are sufficient assets there  
5 to actually undertake the obligations that are part of the  
6 transfer agreement which are post-petition obligations of this  
7 Chapter 11 case.

8 I think in order for the Court, though, to understand  
9 at least from a laymen's term, and I have to say I'm not an  
10 environmental attorney; I'm a bankruptcy attorney. But as I  
11 understand ISRA and the obligations that were taken on by DPH  
12 Holdings or by Delphi at the time they entered into the  
13 remediation, they are briefly this. On the anniversary of the  
14 remediation, which comes up in the summer of every year, Delphi  
15 or DPH Holdings is obligated to provide to the State of New  
16 Jersey an estimate of what they believe it will take to  
17 remediate this property. And it's not actually a remediation  
18 plan so much as a part of the investigation, but that would  
19 lead to an actual amount that it was cause them to expend to  
20 clean the property, and at that time, they are to deposit in a  
21 trust that's been set up in JPMorgan Chase adequate funds for  
22 the remediation. Now, in 2006 when the remediation was entered  
23 into, there were about 535,000 dollars that were placed into  
24 that trust fund. Each year, they're supposed to reevaluate  
25 this as they work through the estimation process and the actual

Page 20

1 investigation process as to what it will take to remediate and  
2 place additional funds. In January of 2009, additional funds  
3 were put into the trust that equal 1.86 million dollars. After  
4 that time, the State of New Jersey commented on the estimate  
5 and the investigation that had been done to date and said there  
6 are additional items on this to-do list, and logically, it  
7 would seem to Johnson Controls and, I think, probably to the  
8 State of New Jersey, that that would increase the cost of  
9 remediation. At any rate, no further funds have been deposited  
10 in that. A new estimate was provided in January of 2010,  
11 again, for 1.86 million. There was no additional expense  
12 anticipated, I guess, on the part of DPH Holdings at that time.  
13 And it's basically that Johnson Controls who has owned this  
14 property since 2006, anticipating that Delphi or DPH Holdings  
15 would undertake the remediation, has seen no progress towards  
16 that. It's incurring additional expenses relating to holding  
17 that property.

18 But what it really wants to know, and what the point  
19 of this motion is --

20 THE COURT: But why isn't it up to the New Jersey DEP  
21 to say that the January estimate was too low?

22 MS. THORNE: Yes, it is, ultimately, and it's our  
23 understanding that by November 30th, they're going to come back  
24 with a comment from the letter that they filed yesterday.

25 THE COURT: Okay.

Page 21

1 MS. THORNE: And so in some respects, maybe we should  
2 wait until December 1st to see what they say. But we believe,  
3 based on Johnson Controls' investigation, it's going to cost at  
4 least eight million dollars to remediate.

5 THE COURT: But that's not the deal, right? It isn't  
6 what Johnson Controls says it's going to cost; it's what the  
7 New Jersey DEP says it's going to cost.

8 MS. THORNE: Well, ultimately, there has to be a  
9 cleanup of the property. That's what the State of New Jersey's  
10 looking for.

11 THE COURT: I've never known a party with a cleanup  
12 obligation to -- unless they're the owner, but the obligation  
13 is to comply with ISRA -- to pay more than what the  
14 environmental people say should be paid.

15 MS. THORNE: Well, Your Honor, the 1.8 -- let's say  
16 the 1.86 million is --

17 THE COURT: It's just, it's premature, isn't it?

18 MS. THORNE: Well --

19 THE COURT: I mean, what --

20 MS. THORNE: -- it's not really premature, Your Honor.  
21 The 1.86 million that's been put in the trust fund is not for  
22 remediating the property. That's a trust fund that's there to  
23 secure the obligation.

24 THE COURT: But there's a process in place, and that's  
25 what the parties deal was, is to abide by ISRA. Why go beyond

Page 22

1 that process?

2 MS. THORNE: Well, Your Honor, we're asking for  
3 assurance that there's actually going to be money. Let's say  
4 that 1.86 million is the appropriate amount. We don't even  
5 know, based on our inquiry, whether there's sufficient assets  
6 to clean it up at that level at 1.86 million.

7 THE COURT: Isn't it money in trust? Maybe I'm  
8 missing something.

9 MS. THORNE: The money in trust does not remediate the  
10 property. It's there to protect them in case they don't do  
11 that.

12 THE COURT: No, but the 1.86 is --

13 MS. THORNE: They can't take that out to go and start  
14 digging and cleaning up the property?

15 THE COURT: But isn't that the adequate assurance,  
16 that it's there if they don't do it?

17 MS. THORNE: No, that's adequate assurance, perhaps,  
18 to the State of New Jersey. That's not adequate assurance to  
19 Johnson Controls.

20 THE COURT: Well, why are you entitled to anything  
21 more than that?

22 MS. THORNE: We're entitled to know that they can  
23 clean the --

24 THE COURT: Under the contract? The contract says  
25 that Johnson Controls has the right to say you have to put up

Page 23

1 more?

2 MS. THORNE: Your Honor, I'm not saying what the  
3 amount is. I'm saying, do they have 1.86 million today to  
4 clean up the property if that.

5 THE COURT: It's in trust.

6 MS. THORNE: They do ultimately have --

7 THE COURT: It's money in trust, right?

8 MS. THORNE: But they don't get to use that money to  
9 clean it up. That money sits there to protect the State of  
10 New -- citizens of New Jersey. But that's not money that  
11 DPH --

12 THE COURT: Why isn't that the adequate assurance?  
13 You just said you don't know if they have the 1.86.

14 MS. THORNE: But they'll never --

15 THE COURT: If they don't, they have the 1.86 in  
16 trust.

17 MS. THORNE: I don't know if the State of New Jersey  
18 is going to give that to anybody to go actually clean up the  
19 property. That's not what ISRA says. ISRA says you have to  
20 put that there. At some point, perhaps the State of New Jersey  
21 takes --

22 THE COURT: For what purpose?

23 MS. THORNE: I assume to protect the citizens of the  
24 State of New Jersey. It does nothing to protect Johnson  
25 Controls.

Page 24

1 THE COURT: I just --

2 MR. MEISLER: Your Honor, that's just wrong. That is  
3 just wrong on the law. The money is there for cleanup  
4 obligations in the event DPH defaults. I happen to think that  
5 adequate assurance is the wrong terminology for --

6 THE COURT: Well, I agree. I mean, we're using it  
7 very loosely here.

8 MR. MEISLER: That's right.

9 THE COURT: There's nothing in the contract that  
10 provides a right to Johnson Controls for adequate assurance,  
11 right?

12 MS. THORNE: The contract provides that DPH Holdings  
13 has certain obligations to clean up the property.

14 THE COURT: Right, and is there any suggestion that  
15 that -- from the New York (sic) DEP that that's not being  
16 complied with?

17 MS. THORNE: The New Jersey DEP is going to comment on  
18 it.

19 THE COURT: All right.

20 MS. THORNE: When they responded last time, they  
21 didn't increase the amount even though there were additional  
22 items that New Jersey said they had to include.

23 THE COURT: All right, okay.

24 MS. THORNE: So logically speaking, it should be an  
25 amount more than 1.86 million. But the problem is this pokes

Page 25

1 along through all this --

2 THE COURT: Well, I have to assume that they're  
3 logical. I just --

4 MS. THORNE: Well, I think that DPH Holdings --

5 THE COURT: -- this is really -- at best, this is  
6 premature. But I really -- I mean, at best. But it seems to  
7 me that the proper way to deal with this is if, in fact, the  
8 New Jersey DEP has an issue, then DPH, who has its obligations  
9 under ISRA, will deal with that. And if it's not, then the New  
10 Jersey DEP will deal with them.

11 MS. THORNE: Well, Your Honor, our fear is we all  
12 know -- I think everybody can take judicial notice at this  
13 point, the State of New Jersey is very underfunded. DPH  
14 Holdings, it has the advantage of it poking through the New  
15 Jersey system while they have no employees to take a look at  
16 this. Meanwhile, there are administrative claims in this case  
17 that are going to have to be paid, either to the State of New  
18 Jersy under ISRA or to Johnson Controls. And our fear is as  
19 everybody's taking advantage of the economic downturn and the  
20 fact that the state is underfunded, that we're going to be at  
21 the end of the road, maybe in five years, maybe in two years,  
22 and there won't be any money left.

23 THE COURT: I just --

24 MS. THORNE: And if -- when we had the meeting last --

25 THE COURT: You want me to assume that the New Jersey

Page 26

1 DEP is not doing its job? You want a judicial order of that?

2 MS. THORNE: No, I think the point is that they're --

3 THE COURT: I mean, it seems to me -- first of all, I  
4 have a serious question about my jurisdiction over your motion  
5 in the first place. This is post-confirmation, it involves a  
6 relationship between DPH and, first and foremost, the New  
7 Jersey DEP, so to the extent -- I take you at your word; you're  
8 not trying to determine an admin claim today.

9 MS. THORNE: No, I'm not.

10 THE COURT: I understand that. So to the extent it's  
11 not an admin claim motion, I don't see why this isn't being  
12 dealt with under New Jersey law and New Jersey with the DEP. I  
13 mean, I just don't -- I don't see what the -- why it's here.

14 MS. THORNE: Our --

15 THE COURT: I mean, and particularly when you're  
16 telling me that I should be somehow forcing DPH to do something  
17 because you're skeptical that the New Jersey DEP won't do its  
18 job. I mean that just doesn't -- I'm not going to do that.

19 MS. THORNE: Your Honor, last summer when we met with  
20 DPH Holdings, all we were asking is are you going to be  
21 financially capable of performing this remediation as you're  
22 obligated under the transfer agreement.

23 THE COURT: But that assumes so much, in that  
24 question. That assumes what the cost of the remediation is and  
25 what compliance with ISRA is, and I would -- it's a trick

Page 27

1 question. I would answer the question by saying it's a trick  
2 question. I mean -- if you're -- there's one legitimate  
3 concern that you have here, which is that based on adequate  
4 information, the debtor is administratively insolvent. But the  
5 debtor is well aware of its obligations not to continue  
6 operating if it's administratively insolvent. But I just --  
7 everything that I've seen, this is all way premature on that  
8 point.

9 MR. MEISLER: And Your Honor, they have no reasonable  
10 basis to assume that we're administratively insolvent. We have  
11 done nothing to give JCI that indication.

12 What I see here at its heart, I see two things.  
13 Number one, this is basically a feasibility objection to our  
14 plan. They got notice of our plan; they could have objected to  
15 feasibility. On that score, it's res judicata. And then at  
16 worst, Your Honor, I understand you said at best, we understand  
17 what they're doing, but at worst, this is manipulation.  
18 They're manipulating the claims procedures to try to do an end  
19 run around the claims procedure. Their motion was a carbon  
20 copy of their proof of claim.

21 And they're running around talking to DEP, and based  
22 on communications with DEP, there was a misunderstanding of  
23 fact, or there wasn't a complete picture, that prompted the  
24 DEP, on November 4th, to give us a notice of violation that was  
25 simply wrong in fact. And ironically, on November -- I think

Page 28

1 it was November 5th, we got another notice from a different  
2 department in DEP telling us that our cost estimate is due on  
3 February 1st, 2011, realizing that we filed something in  
4 January 2010. And so when we reached out to DEP to understand  
5 what was that notice of violation about, and we were going to  
6 comply, Your Honor -- and we have always said that we're going  
7 to comply -- the DEP suddenly understood that they were  
8 mistaken.

9 Now, Your Honor, it's okay if they have comments or if  
10 they -- there's a process under ISRA to deal with their  
11 comments. And we're complying with ISRA. We have complied and  
12 we will continue to comply. And despite the comment in  
13 counsel's papers that we have not complied and we will not  
14 comply, that's false.

15 THE COURT: But my question is why should I be  
16 deciding whether you complied or not? I mean, it's a matter of  
17 New Jersey regulatory law. I just don't --

18 MR. MEISLER: Your Honor, on that score, I would ask  
19 that I give more thought to that. I do think that Your Honor  
20 has jurisdiction under the order approving the transfer  
21 agreement where you retained authority and jurisdiction to  
22 implement the terms of the order.

23 THE COURT: Well, that is only to construe the order.  
24 But, I mean, this -- everyone agrees, I think, what the  
25 contract says. And that all depends on your compliance on

Page 29

1 ISRA. And that's an issue that -- I mean, if they have -- if  
2 they dispute that you're complying with ISRA, it seems to me  
3 that that's a matter of New Jersey law and the process should  
4 work its way through on that.

5 MR. MEISLER: And Your Honor, I would say that to  
6 counsel that if we were not in compliance with New Jersey law,  
7 we would get a legitimate notice of violation.

8 THE COURT: Well, it makes sense to me.

9 MS. THORNE: Your Honor, first of all, I want to just  
10 refute one thing that counsel said and that somehow, Johnson  
11 Controls should not be speaking to the Department of  
12 Environmental Protection for New Jersey. We're the landowner,  
13 and we're under their --

14 THE COURT: Well, I don't --

15 MS. THORNE: -- we have to speak to them.

16 THE COURT: -- there's -- it depends -- I don't know.  
17 That's another issue. Do people who deal with this on a daily  
18 basis at the New Jersey DEP and the lawyers who deal with these  
19 types of issues know whether -- which one of you is right on  
20 that? But it's another reason why I just think this motion  
21 doesn't -- it really doesn't make a lot of sense to me at this  
22 point. I mean, I don't know why you're asking me to interject  
23 myself in something that really doesn't even appear to be a  
24 controversy at this point.

25 MS. THORNE: Well, we certainly think that they have

Page 30

1 not set aside enough money. We have serious questions about  
2 whether they're administratively solvent. Maybe those  
3 questions would be --

4 THE COURT: But based on what?

5 MS. THORNE: Well, Your Honor, based on the fact that  
6 we were told it was none of our business if they had assets.

7 THE COURT: But that doesn't mean --

8 MR. MEISLER: Your Honor, it isn't.

9 MS. THORNE: I mean, we're a creditor of this estate,  
10 if nothing else; we're an administrative creditor that has a  
11 lot at stake. And you would think that within the bankruptcy  
12 context, that the debtor, the post-confirmation debtor could  
13 share with its administrative claim holders, even with this  
14 dispute that we are not subject to -- that we don't appear in  
15 their books and records, which is another issue for another  
16 day, but the fact that they have said there that they don't owe  
17 us any money, that they have these no obligations --

18 THE COURT: But if --

19 MS. THORNE: -- makes us very concerned that there may  
20 not be any money at the end of the day.

21 THE COURT: But if the million-eight, six is the right  
22 number, they don't owe you any money.

23 MS. THORNE: If they actually do the remediation. If  
24 they don't do the remediation, that 1.86 million may go to the  
25 State of New Jersey. It's not going to come to us.

Page 31

1 THE COURT: It's not?

2 MR. MEISLER: Your Honor, counsel needs to look at  
3 Section 4 of the --

4 THE COURT: I'd be very surprised about that. I'd be  
5 very surprised that an environmental statute that requires, in  
6 essence, a security deposit for a cleanup trust can be used to  
7 pay New Jersey's school bill. That just doesn't make sense to  
8 me.

9 MS. THORNE: I don't believe the statute's completely  
10 clear, but I think that is a -- that's an issue for New Jersey.  
11 But if the 1.86 is not --

12 THE COURT: It certainly was -- none of this comes up  
13 in your pleading. I mean, you just say you're concerned and  
14 the reason you're concerned is because they don't agree with  
15 your number on the cost of the cleanup.

16 MS. THORNE: Nor do we know that they have enough to  
17 effectuate the cleanup, and that's our real concern.

18 MR. MEISLER: Your Honor --

19 MS. THORNE: Which I think could easily --

20 THE COURT: But why do they have to tell you that they  
21 have the amount that you think it's going to cost when New  
22 Jersey is not telling them it's going to cost that. Why do  
23 they have to budget -- what's the amount of your claim?  
24 Thirteen million dollars? Why do they have to hold aside  
25 thirteen million dollars when New Jersey's telling them that,

Page 32

1 as far as they know, the amount held in trust is the right  
2 number?

3 MS. THORNE: Well, as of a day ago, New Jersey didn't  
4 say that. Then they withdrew their letter yesterday.

5 THE COURT: Well, all right. So --

6 MS. THORNE: So Your Honor, I don't know what New  
7 Jersey thinks. I think New Jersey will tell us what they  
8 think --

9 THE COURT: Well, I know what they thought as of  
10 November 17th.

11 MS. THORNE: Well, I know that they said that they're  
12 going to make a comment on November 30th or before that, so.

13 THE COURT: All right, well, I'm not going to get  
14 ahead of them. It's that simple.

15 MS. THORNE: I think that's -- that's fair.

16 THE COURT: Okay.

17 MR. MEISLER: And Your Honor, for the benefit of  
18 counsel, section 4 specifically deals with the funds that are  
19 set aside -- and this is in the remediation trust fund  
20 agreement -- and it specifically says that the funds set aside  
21 are to be used for cleanup. I just don't understand why she  
22 would think that it could be used to pay the school bills.

23 MS. THORNE: Just hypothetically speaking, if the  
24 cleanup costs something between 1.86 million and the 8 million  
25 that we believe, and there's only 1.86 million in that trust

Page 33

1 fund, if counsel's correct, although the State of New Jersey  
2 has not confirmed that, that that could be used for the  
3 cleanup, we still are going to be left holding the bag for a  
4 greater deal of money.

5 THE COURT: But that's -- but that's -- but I don't  
6 think the contract says that they have to -- I think the  
7 contract says they have to comply with ISRA, right?

8 MS. THORNE: And the purpose of ISRA is to clean up  
9 the property. And if they've --

10 THE COURT: All right, but ISRA is a carefully-crafted  
11 statute that has these intermediate steps just for this reason,  
12 that, obviously, landowners are going to want the maximum  
13 amount set aside and potentially responsible parties are going  
14 to want to have the minimum amount set aside, and there's  
15 someone who oversees it.

16 MS. THORNE: Well, at the end of the day, the goal of  
17 ISRA is to clean up the property.

18 THE COURT: Well --

19 MS. THORNE: And this is --

20 THE COURT: -- yes, but again that begs the question  
21 because there's a monitor of that. Originally, it was the DEP,  
22 then there's this process to hire the outside monitor --

23 MS. THORNE: Right.

24 THE COURT: -- and it's all supposed to work that way.  
25 And I'm not going to assume it doesn't, it's not working that

Page 34

1 way. It sounds like the DEP is focused on it. So they have  
2 their requirements; that's what the statute provides. Why  
3 compel -- I mean, again, I'm not sure it's really my place to  
4 say this in the first place, but logically, why compel someone  
5 to pay more than the statute requires? It just -- I don't see  
6 it.

7 MS. THORNE: Your Honor, if we were given information  
8 to know that no matter what New Jersey says when they comment  
9 in November or when they comment later on when the LSRA's  
10 involved, that there'll be enough funds to effectuate the  
11 cleanup, I think that would satisfy Johnson Controls to a --

12 THE COURT: But that accelerates the whole process.  
13 That accelerates the whole estimate. Look, people thought  
14 enough funds to do the cleanup in 2006 was 550,000 dollars. I  
15 mean, these numbers change. Why -- unless you're saying --  
16 which I think you are, ultimately, saying which is why I think  
17 you got the cold shoulder at your meeting -- that we want to  
18 know that whatever it costs, and let's put as high a number as  
19 possible on it, you'll have the money to pay whatever it costs,  
20 that -- they're not required to do that.

21 MS. THORNE: Well, it's a legitimate concern when  
22 we're talking about DPH Holdings, an entity that does not  
23 have --

24 THE COURT: But they're not required to set aside  
25 whatever it costs.

Page 35

1 MS. THORNE: Well, but they said, Your Honor, in their  
2 plan, that they would be able to pay all administrative  
3 expenses.

4 THE COURT: And right now, the administrative expenses  
5 are the amount that the responsible party for policing the  
6 statute says that they are.

7 MS. THORNE: And so all administrative creditors that  
8 have claims of this nature, and I assume that there are others,  
9 will just have to go on faith that there will be enough --

10 THE COURT: I think that's a realistic -- well, on the  
11 faith of the New Jersey DEP, yes.

12 MS. THORNE: Well, but DPH Holdings has to ultimately  
13 have enough assets to be able to perform under that.

14 THE COURT: But there's no -- but right now, the  
15 money's there. The adequate assurance is there in a trust  
16 fund. I just -- I think you're asking to accelerate that  
17 process in a way that neither the statute nor the agreement  
18 contemplated. And I just -- I don't think you have a right to  
19 that relief. I mean, if there was no trust fund and there was  
20 a contractual cleanup obligation that didn't say comply with  
21 ISRA, there might -- then you might have a basis to take some  
22 discovery, at least, as to what their abi -- what that  
23 financial condition is, but that's not what we're talking about  
24 here. You have someone who does that difficult task of  
25 balancing the needs of the owner and the potentially

Page 36

1 responsible party or the responsible party, and that person is  
2 a regulator who's charged with this job, and they're doing it.  
3 And there's nothing to suggest that DPH is not complying with  
4 them. It has to comply with them. So I just -- you're asking  
5 for more than you're entitled to.

6 MS. THORNE: Well, Your Honor, then in that case,  
7 we'll hear what New Jersey says on November 30th.

8 THE COURT: Yeah, but I don't want you running back to  
9 me and shortchanging the process that ISRA has in place for  
10 dealing with that back and forth on the comments. There's --  
11 I'm not going to turn myself into the New Jersey DEP. It's not  
12 my job.

13 MS. THORNE: No, I'm certainly not, and I certainly  
14 don't want you to think that Johnson Controls is asking you do  
15 that. Our concern is really --

16 THE COURT: Well, if you're going to run back on  
17 Nov -- if they say on November 23rd, we think you should  
18 increase the trust fund to two millions or three million  
19 dollars, if they say that, and DPH says, well, we exercise our  
20 right under whatever provision, whatever reg, to meet and  
21 confer with you, New Jersey DEP, and explain to you why it  
22 should be a million-nine, I'm not going to shortchange that.

23 MS. THORNE: Your Honor, and I have never asked -- I'm  
24 not asking the Court to become the --

25 THE COURT: Okay.

Page 37

1 MS. THORNE: -- New Jersey Department of Environmental  
2 Protection.

3 THE COURT: All right.

4 MS. THORNE: What I'm only concerned about is that  
5 ultimately, the cleanup will be able to be performed, and  
6 there'll be adequate financial resources at that point.

7 THE COURT: Well, all right, so I think what should  
8 happen with this motion is that it should be adjourned without  
9 date at this point. And if and when there's a -- it is clear  
10 that DPH is not complying with its obligations under ISRA, then  
11 frankly, I think you should go and enforce your contract in New  
12 Jersey, but I guess you could come back here at that point.

13 MS. THORNE: Well, we very well may do that, and that  
14 was --

15 THE COURT: All right.

16 MS. THORNE: And really, the purpose of this today was  
17 to see if there could be a resolution short of filing a  
18 lawsuit, but obviously, we're aware that that may be the only  
19 option we have.

20 THE COURT: Okay, but the lawsuit would not be to  
21 collect on the claim.

22 MS. THORNE: No, I certainly understand there's a  
23 claims procedure.

24 THE COURT: It would be to enforce your rights under  
25 ISRA.

Page 38

1 MS. THORNE: Right, we understand.

2 THE COURT: Okay.

3 MR. MEISLER: Your Honor, if I may ask, I would ask  
4 that the motion be denied without prejudice.

5 THE COURT: All right, it's the same thing. That's  
6 fine. I mean, you're going to have to refile it with new facts  
7 anyway, so.

8 MS. THORNE: I understand.

9 MR. MEISLER: Right.

10 MS. THORNE: Yeah, I understand.

11 THE COURT: All right, so it shall be done. You can  
12 submit an order --

13 MR. MEISLER: Thank you, Your Honor.

14 MS. THORNE: Thank you.

15 THE COURT: -- denying it without prejudice.

16 MR. TULLSON: Your Honor, that concludes the omnibus  
17 hearing.

18 THE COURT: All right, well what -- am I missing  
19 something? I thought ATEL Leasing?

20 MR. TULLSON: Your Honor, that's on the --

21 MR. PFEIFFER: Your Honor, Mark Pfeiffer for ATEL.  
22 I'm on CourtCall.

23 MR. TULLSON: That's on the claims hearing.

24 THE COURT: Oh, I thought you meant all the omnibus  
25 hearing.

Page 39

1 MR. TULLSON: No, no, just the matters scheduled for  
2 the omnibus.

3 THE COURT: All right, fine. So let's deal with ATEL  
4 Leasing, then, unless you want to go through the agenda, the  
5 other matters.

6 MR. TULLSON: Sure, I mean, item number 1 is  
7 adjourned; items 2 through 5 are settled by stipulation. Items  
8 6 through 9 involve Continental claims; those are being handled  
9 by Togut & Segal (sic) but those have been resolved and they'll  
10 be submitting an order to chambers.

11 THE COURT: Okay.

12 MR. TULLSON: And that brings us to matters 10 and 11  
13 on the agenda.

14 THE COURT: Okay, which is the ATEL Leasing?

15 MR. TULLSON: Yes, Your Honor.

16 THE COURT: Okay.

17 MR. TULLSON: And this involves sufficiency hearings  
18 regarding the status of the claims of ATEL Leasing Corporation.

19 Your Honor, proof of administrative expense claim  
20 number 18427 was rejected to on the reorganized debtors' forty-  
21 sixth omnibus claims objection, and the motion of ATEL Leasing  
22 Corporation found at docket number 6990 was objected to on the  
23 reorganized debtors' forty-eighth omnibus claims objection.

24 Your Honor, ATEL has released any and all claims that  
25 it may have had rising before October 7th, 2009. On that date,

Page 40

1 Your Honor entered the stipulation and agreed order resolving  
2 all of ATEL Leasing Corporation's claims, and that was entered  
3 at 18965.

4 Your Honor, paragraph 3 of the stipulation contains an  
5 unambiguous release not only of the ATEL cure proposal or the  
6 assumption and assignment objection, but also of all of their  
7 claims arising prior to October 7th, 2009. Specifically  
8 paragraph 3 of the stipulation reads as follows: "The ATEL  
9 Leasing parties further release and waive any right to assert  
10 any other claim, cause of action, demand, lien, or liability of  
11 every kind and nature whatsoever including those arising under  
12 contract, statute or common law, whether or not known or  
13 suspected at this time which relate to the ATEL cure proposal  
14 or assumption and assignment object, or which relate to ATEL  
15 releasing parties' claims which they have ever had or hereafter  
16 shall have against the debtors based on, arising out of,  
17 related to, or by reason of any event, cause, thing, act,  
18 statement, or admission occurring before the date of the  
19 stipulation." All of the amounts asserted in the motion of  
20 ATEL Leasing Corporation arose before February 17th, 2007, and  
21 all of the amounts asserted in claim 18427 arose before May  
22 31st, 2009. Thus the ATEL administrative expense claim and the  
23 motion were fully released, pursuant to the stipulation.  
24 Accordingly, each proof of administrative expense claim and the  
25 motion should be denied and disallowed and expunged in their

Page 41

1 entirety.

2 Your Honor, we did file a second supplemental reply  
3 yesterday addressing several of the arguments raised by ATEL.

4 THE COURT: Right, I've seen that.

5 MR. TULLSON: And a supplemental response. But Your  
6 Honor, I'd be happy to cede the podium to counsel for ATEL.

7 THE COURT: Okay.

8 MR. TULLSON: Unless Your Honor has questions for me  
9 at this point.

10 THE COURT: Well, I may after I hear from him.

11 And it's Mr. Pfeiffer?

12 MR. PFEIFFER: Yes, Your Honor. Mark Pfeiffer for  
13 ATEL Leasing.

14 THE COURT: Okay, good morning.

15 MR. PFEIFFER: Good morning. Your Honor, this is a  
16 sufficiency hearing, the purpose of which is -- it's a  
17 nonevidentiary hearing, the purpose is to address the legal  
18 sufficiency of the claim and whether the claim states a claim  
19 against the debtor under 7012 of the Rules. Instead of looking  
20 at the claim, the debtor is asking the Court to look at  
21 extrinsic evidence, and the extrinsic evidence is the  
22 stipulation. My client --

23 THE COURT: Well, can I stop you there?

24 MR. PFEIFFER: Yes.

25 THE COURT: I grant motions to dismiss and summary

Page 42

1 judgment motions all the time based on the plain meaning of the  
2 documents upon which a claim is based. I don't know why I  
3 can't do that here if the documents that the parties are  
4 relying on are clear and unambiguous.

5 MR. PFEIFFER: In this case, Your Honor, the documents  
6 are ambiguous --

7 THE COURT: Okay.

8 MR. PFEIFFER: -- and there's a material dispute of  
9 fact which goes to the intent of the parties.

10 THE COURT: How is the stipulation and agreed order  
11 ambiguous on this issue?

12 MR. PFEIFFER: It's ambiguous because there are three  
13 areas that are not necessarily -- that are conflicting. Two of  
14 them are in favor of my client. First of all, when you start -  
15 - if you look at the stipulation, the heading itself, it says  
16 "stipulation and agreed upon resolving objection of ATEL  
17 Leasing Corporation notice of assumption and assignment". The  
18 heading doesn't say it's a general release. And then when you  
19 go to the recitals, the very last recital is the debtors and  
20 ATEL have reached an agreement that settles and resolves the  
21 ATEL cure proposal and the assumption and assignment objection.  
22 It's not a recital which is the intent of the parties; it's not  
23 a recital saying that the parties have agreed to resolve all of  
24 the claims. Looking at that --

25 THE COURT: Can I interrupt you for a second? Aren't

Page 43

1 your underlying claims that are referred to in the proof of  
2 administrative claim, aren't those claims part of the claims  
3 asserted in the cure proposal and the assumption and assignment  
4 objection?

5 MR. PFEIFFER: I do not know specifically if they  
6 are -- there may be some that are part of that plan, and if  
7 that's the case, Your Honor, then we have to parse them out  
8 because it's not a relief of all claims.

9 THE COURT: Well --

10 MR. PFEIFFER: Or, the intent of the parties is not to  
11 release all claims.

12 THE COURT: Well, we'll get to the release language,  
13 but I've read the cure proposal and the assumption and  
14 assignment objection. They refer to outstanding post-petition  
15 claims well in excess of the amount of the proof of  
16 administrative claim, and they cover, I think -- at least the  
17 cure proposal does -- both of these contracts, both of these  
18 leases, so it's hard for me to believe that the administrative  
19 claim is not -- the amount of the administrative claim is not  
20 subsumed within the \$470,637.96 asserted in paragraph 18 as the  
21 total amount due and owing post-petition under the leases.

22 MR. PFEIFFER: Your Honor, if you look at the  
23 stipulation, it is a stipulation that covers one contract  
24 number in which my client got 13,000 --

25 THE COURT: So you don't have an answer to my question

Page 44

1 as to whether your proof of claim amount was subsumed within  
2 the ATEL cure proposal?

3 MR. PFEIFFER: No, I think portions of it may be  
4 outside, and that's an issue of fact --

5 THE COURT: What do I have to believe that portions  
6 would be outside of it?

7 MR. PFEIFFER: I think it's outside of the scope of  
8 what was being resolved here.

9 THE COURT: I need to have some basis, though, to give  
10 credence to your statement to me. Why do you believe that  
11 portions would be outside of it?

12 MR. PFEIFFER: Well, Your Honor, my client would  
13 intend to present evidence, present evidence of negotiations  
14 between the parties as to what the parties intended to resolve,  
15 and it didn't intend to resolve the entire universe of claims  
16 that ATEL has in this particular bankruptcy.

17 THE COURT: Well, the law is clear that we only get to  
18 parol evidence in respect to the intent of the parties to an  
19 agreement if, in fact, the agreement is ambiguous. I'm still  
20 trying to deal with whether the agreement is ambiguous.

21 MR. PFEIFFER: Correct, and it's ambiguous because it  
22 reflects two different intents. And the two different intents  
23 are that, as stated in the stip with the heading, it's only  
24 resolving those two issues, and then the whereas clause, the  
25 final whereas clause can only resolve the cure proposal and the

Page 45

1 assumption and assignment objections.

2 THE COURT: Right, and I guess, although I asked this  
3 question ten minutes ago, I'm going to ask it of you one more  
4 time, why doesn't the cure proposal include, since it refers to  
5 both of the leases that are the bases for the admin claim and  
6 refers to post-petition amounts owing under them in excess of  
7 the admin claim, why doesn't the ATEL cure proposal subsume the  
8 admin claim?

9 MR. PFEIFFER: Your Honor, I think you have to look at  
10 specifically what's in there --

11 THE COURT: I have. I have, and I'm asking you why  
12 it doesn't, because based on what I can see, it does.

13 MR. PFEIFFER: But the intent of the parties was not  
14 to resolve the entire universe.

15 THE COURT: All right, let's go on. I'm assuming the  
16 answer to that, my question, is, then, that it does subsume or  
17 you don't know. So then let me ask you the next question.

18 If, in fact, the cure amount in respect of D450140635,  
19 the one contract that you say this is all about, is the only  
20 reason for this stipulation, why is there a separate admin  
21 claim provided for in paragraph 2; why in paragraph 3 does this  
22 say that the cure payment and the agreed admin amount are in  
23 full satisfaction of all amounts asserted in the ATEL cure  
24 proposal and assumption and assignment objection; and why in  
25 paragraph 3 does it also say the ATEL Leasing parties further

Page 46

1 release and waive any right to assert any other claims which  
2 relate to the ATEL cure proposal or assumption and assignment  
3 objection or --

4 MR. PFEIFFER: Well --

5 THE COURT: Let me finish. And this is the most broad  
6 language, "or which the ATEL Leasing parties have, ever had, or  
7 hereafter shall have against the debtors based upon, arising  
8 out of, related to, or by reason of any event, cause, thing,  
9 act, statement, or admission occurring before the date of the  
10 stipulation." Why isn't that a general release?

11 MR. PFEIFFER: That language after the "or" is, of  
12 course, the part that's most problematic for my client. But it  
13 does not reflect it -- the agreement of the parties is  
14 reflected in their recital, the intent of the parties. And  
15 that's how you really have to --

16 THE COURT: So the recitals govern over the actual  
17 agreement?

18 MR. PFEIFFER: Under that New York case where there's  
19 a disagreement between the recital and the language of the  
20 contract, that creates an ambiguity.

21 THE COURT: Okay.

22 MR. PFEIFFER: And because of that ambiguity, as a  
23 matter of law, extrinsic evidence is required. It's an  
24 ambiguity as a matter of law because the intent is recited in  
25 the front of the contract and there is language that is

Page 47

1 arguably different from that, its intent in the back of the  
2 contract. And that --

3 THE COURT: But again, you're referring to the last  
4 "whereas" recital?

5 MR. PFEIFFER: Correct.

6 THE COURT: Okay.

7 MR. PFEIFFER: And the heading of the agreement.

8 MR. TULLSON: Your Honor, counsel's relying on the  
9 Rickel case which we address in our papers, and we think that  
10 that case is completely different, arises out of different  
11 facts. It was a situation where a former director fraudulently  
12 or recklessly misrepresented the value of certain claims to the  
13 debtors, and the debtors did not become aware of that claim  
14 until eight months after the stipulation was entered. Here,  
15 ATEL filed the administrative claim prior to the execution of  
16 the stipulation and the language is clear. I don't think  
17 Rickel stands for the proposition any time a party's --  
18 sophisticated parties represented by counsel aren't happy with  
19 the result of negotiated language, that they can say it's  
20 ambiguous because I don't think it was my intent to release all  
21 claims, even though the claim is in administrative expense  
22 claim 18427 arise under the exact same leases.

23 MR. PFEIFFER: Your Honor, Rickel is directly on  
24 point, here. It stands to the proposition, and this is a  
25 quote, that ambiguity as a -- or, a paraphrase -- ambiguity is

Page 48

1 created as a matter of law where the agreement recites the  
2 intent to settle a narrow issue but the agreement includes a  
3 general release. That's what the proposition under Rickel is.  
4 There's an ambiguity as a matter of law --

5 THE COURT: But the parties here defined what they  
6 were settling. Isn't that distinguishable? I mean, the  
7 parties actually, unlike in Rickel, the parties here specified  
8 what they were settling.

9 MR. PFEIFFER: Which was only two things.

10 THE COURT: Well, I still have a -- I have a very --  
11 and what are those two things, again, that you say they are?

12 MR. PFEIFFER: The cure proposal and the assumption  
13 and assignment objection.

14 MR. TULLSON: Anything that relates to --

15 THE COURT: And why is the cure proposal, which states  
16 the amount of this claim, somehow -- I mean, why is that a good  
17 fact for you?

18 MR. PFEIFFER: Well, it's -- it's the amount that was  
19 required to be paid at the time of the cure as opposed to the  
20 general administrative claim. It's not neces -- it may be a  
21 timing issue. It may be issues concerning the assumption and  
22 assignment, but I think those are issues that I think you have  
23 to have testimony on and evidence on to resolve.

24 THE COURT: But the cure proposal asserts a post-  
25 petition claim in excess of 400,000 dollars relating to these

Page 49

1 two leases. Why -- and then this stipulation says it's  
2 settling anything related to that proposal, which includes a  
3 post-petition claim for in excess of 400,000 dollars.

4 MR. PFEIFFER: But that's the proposal for the cure,  
5 and it's not necessarily a proposal for a broader general  
6 administrative claim.

7 THE COURT: What's broader than -- I mean, this is  
8 smaller. This claim is less than the amount that's asserted in  
9 the cure proposal.

10 MR. PFEIFFER: But the cure proposal is -- the timing  
11 of the cure proposal's important. What needed to be cured  
12 before the allowance of the -- or, the assumption and  
13 assignment.

14 THE COURT: So? I don't understand the -- I don't get  
15 the significance of that point. The cure proposal was made  
16 well before the date of this stipulation, obviously, right?

17 MR. PFEIFFER: Correct.

18 THE COURT: And I don't see any contradiction of the  
19 debtors' statement that the claims asserted in the  
20 administrative prove of claim all occurred before the date of  
21 the stipulation, October 7th, 2009. Is there -- and the amount  
22 set forth in the cure proposal is 300,000 dollars higher than  
23 the proof of claim.

24 MR. TULLSON: And Your Honor, going to the timing  
25 point, paragraph 6 of the stipulation further reflects that the

Page 50

1 unambiguous language of the agreement governed all claims  
2 arising before the date of the stipulation because it preserves  
3 their rights for any claims arising after the date of the  
4 stipulation, or secondly, relating to the outstanding post-  
5 petition obligations that are not yet due and payable in  
6 connection with the ATEL contracts being assumed by the debtor  
7 and assigned to the applicable buyer. That's the reason why  
8 paragraph 6 is included in the order.

9 MR. PFEIFFER: Your Honor, paragraph 6 is entirely  
10 consistent with an understanding that -- paragraph 6 is dealing  
11 with the contracts being assumed. Not necessarily all of these  
12 contracts ended up being assumed, and that's what the issue is.  
13 Not everything wound up being assumed, and that's -- the  
14 remainder of that wasn't assumed is -- portion of that is  
15 really what's at issue.

16 MR. TULLSON: Your Honor, I think if that reading of  
17 paragraph 6 was correct, you'd need commas. You would need to  
18 say any -- after "before and are not yet due and payable". So  
19 "or relating to post-petition obligations, that are not yet due  
20 and payable," and that's just not how it's constructed. This  
21 is in addition to the fact that it's released both as related  
22 to the cure proposal and the further release of any other  
23 claims that they have before the date of the stipulation.

24 THE COURT: I guess the other issue -- I mean, I  
25 touched on this very briefly, but paragraph 2 doesn't deal with

Page 51

1       cure. It deals with an allowed administrative claim.

2                   MR. TULLSON: That's right. And even on the argument  
3       that you look at the recitals, it's not simply dealing with the  
4       assumption and assignment objection.

5                   MR. PFEIFFER: Your Honor, I think the issue here is  
6       there are certain contracts that were not assumed and assigned,  
7       and this stipulation was intended to cover only those contracts  
8       that were assumed and assigned. And the mere fact that there's  
9       a question concerning what paragraph 2 relates to, that creates  
10      an ambiguity. What did the parties intend? Why is that in  
11      there? If it appears to stick out, why was it in there? What  
12      was the intent? And if you go back, it looks like it was a  
13      narrow intent from the recital. And then there's a broader  
14      language at the tail end, at the very tail end of the release  
15      that conflicts with that narrow intent to only resolve the  
16      issues concerning the claims that were assumed and assigned.  
17      Because there wouldn't be any need to cure claims that weren't  
18      being assumed.

19                  THE COURT: Okay.

20                  MR. PFEIFFER: And since you have this conflict, I  
21      think you need testimony from the, A, the parties that  
22      negotiated it, and B, what happened after the negotiations, and  
23      we're ready to present evidence, Your Honor, that says what the  
24      intent was and that this was not intended to get rid of all the  
25      claims that we've asserted. And we would like to present

Page 52

1 evidence, but since this is a sufficiency hearing, I can't.

2 THE COURT: Okay.

3 MR. TULLSON: Your Honor, we don't see the ambiguity.

4 The agreement is clear. You don't get to the point of -- if we  
5 had an evidentiary hearing, we would just say this is the  
6 unambiguous language of the stipulation. I'm not even sure  
7 what you could say in a meet and confer. This is an agreement;  
8 it clearly deals with more than the assumption and assignment  
9 of contract number D450140635. It's in paragraph 2 of the  
10 stipulation, and it's in paragraph 3, and it's in paragraph 6.

11 THE COURT: What's in paragraph -- I'm sorry, what are  
12 you saying is in these paragraphs?

13 MR. TULLSON: Well, that they obtained an allowed  
14 administrative expense claim, and that is reflected in not only  
15 the assumption and assignment of that one purchase order, but  
16 the release of their entire cure proposal which covers the  
17 exact same leases.

18 MR. PFEIFFER: My client is just resolving the  
19 assumption issue, resolving the leases that were assumed and  
20 assigned. This goes beyond that. This release goes beyond  
21 that, but the intent of the parties as set forth in the whereas  
22 clause and in the heading is only dealing with the contracts  
23 that were assumed and assigned. That's where I think the  
24 ambiguity is, and I think that's what's important to use  
25 evidence to hear what the parties recall -- what actually

Page 53

1 occurred during the negotiations, what the intent was, and what  
2 the discussions and correspondence back and forth, and what  
3 happened afterwards. And my client wants to submit evidence on  
4 that because we think we have dispositive evidence.

5 THE COURT: Okay, I'll take a couple minutes and then  
6 be back with my ruling.

7 MR. TULLSON: Thank you, Your Honor.

8 (Recess from 11:46 a.m. to 11:58 a.m.)

9 THE CLERK: All rise.

10 THE COURT: Please be seated.

11 Okay, we're back on the record in In re: DPH Holdings.  
12 I've just heard oral argument in connection with the claims  
13 sufficiency hearing with respect to DPH's objection to  
14 administrative expense claim number 18427 filed by A-T-E-L, or  
15 ATEL Leasing Corporation.

16 The objection as clarified by the supplemental  
17 pleadings filed by DPH is premised upon DPH's contention that  
18 the claim set forth in the proof of administrative expense  
19 claim was settled and released by ATEL pursuant to a  
20 stipulation and agreed order dated October 7th, 2009. ATEL  
21 disagrees with that basis, contending that the stipulation and  
22 agreed order does not provide for such a release and in any  
23 event is ambiguous and, therefore, entitles ATEL, as well as,  
24 of course, DPH to submit evidence with regard to the parties'  
25 intent in respect of whether the claim that's before the Court

Page 54

1 was, in fact, released. Under this Court's orders establishing  
2 procedures for determining objections to claims and  
3 administrative expenses in this case, the Court staged, in the  
4 claim objection process, a hearing called a sufficiency  
5 hearing, and that is the stage that we're at in connection with  
6 this administrative expense claim objection. The Court has  
7 previously stated that such a hearing is a nonevidentiary  
8 hearing and that it is, instead, one in which the issues before  
9 the Court are analogous to a standard under Bankruptcy Rule  
10 7012 which incorporates Federal Rule of Civil Procedure 12 with  
11 respect to a motion to dismiss, although in addition, where the  
12 claim on its face is premised upon documents that are not  
13 ambiguous and/or the defense to the claim is premised upon  
14 documents that are not ambiguous, the Court not only need not  
15 take further evidence but should not take further evidence  
16 since the unambiguous terms of a dispositive document will be  
17 the sole evidence of the parties' intentions under that  
18 document. Therefore, if, in fact, the stipulation and agreed  
19 order is not ambiguous and controls the outcome of the  
20 objection, there is no reason to proceed beyond a sufficiency  
21 hearing.

22 The law is clear that a stipulation and order is  
23 subject to general principles of contract law. See In re:  
24 Rickel & Associates, Inc., 272 B.R. 74, 85 (Bankr. S.D.N.Y.  
25 2002). As is clear and undisputed, I believe, on the record,

Page 55

1 under such general principles, the agreement or the stipulation  
2 is to be interpreted so as to give effect to the intention of  
3 the parties as expressed in the unequivocal language that they  
4 have employed. The best evidence of intent is the contract  
5 itself. If an agreement is complete, clear, and unambiguous on  
6 its face, it must be enforced according to the plain meaning of  
7 its terms. Language whose meaning is otherwise nonambiguous is  
8 not ambiguous merely because the parties urge different  
9 interpretations in the litigation. Rather, contractual  
10 provisions are ambiguous only if they're objectively  
11 susceptible, without reference outside the contract, to more  
12 than one interpretation by a reasonably intelligent person.

13 Conversely, contract language is unambiguous if it has  
14 a definite and precise meaning, unattended by danger of  
15 misconception, and the purport of the contract itself in  
16 concerning which there is no reasonable basis for a difference  
17 of opinion.

18 Relatedly, a contract should be construed so as to  
19 give full meaning and effect to all of its provisions. Or,  
20 stated in the negative, no provision of the contract should be  
21 left without force and effect. See generally, *In re 18th*  
22 *Avenue Realty, Inc.*, 2010 WL 1849403, pages 5 and 6 (Bankr.  
23 SDNY May 7, 2010), and *In re Rickel & Associates, Inc.*, 272  
24 B.R. at 85, as well as the authorities cited therein. See also  
25 *Wallace v. 600 Partners Company*, 86 N.Y.2d 543, 548 (1995).

Page 56

1 Here, it is contended by ATEL that "the intent of the  
2 assumption and assignment stipulation" -- that's the way that  
3 ATEL has defined the stipulation and order -- was to resolve  
4 solely the parties' disputes concerning the cure amount and  
5 administrative expense claim for one group of equipment  
6 schedules, collectively known as contract D450140635. [Defined  
7 term, the "subject contract"]. Specifically, the assumption  
8 and assignment stipulation provided for a cure payment relating  
9 to the subject contract in the amount of \$13,669.83 and an  
10 allowed administrative claim in the amount 21,750 dollars  
11 relating to the subject contract." That's at paragraph 9 of  
12 ATEL's supplemental response to the claim objection.

13 I have reviewed the claim objection and the related  
14 pleadings, and specifically reviewed at length the October 2009  
15 stipulation and agreed order, and I believe that it is clear  
16 from the plain language of that stipulation and agreed order  
17 that the parties' agreement was not so limited as set forth in  
18 the language I've just quoted from ATEL's supplemental  
19 response. In other words, the plain language of the  
20 stipulation and order makes it clear that the stipulation and  
21 order is not limited to the assumption and assignment of  
22 contract number D450140635 and the cure amount therefor but  
23 covers other rights and claims of ATEL and the parties for whom  
24 it was acting. This is clear from the entire context of the  
25 stipulation as set forth in the language of the stipulation,

Page 57

1 which includes the whereas clause recitals.

2                 The second whereas clause refers to a March 5th, 2008  
3 ATEL -- cure claim of ATEL Leasing Corporation that appears on  
4 the docket of this case, docket number 12976 and is defined in  
5 that whereas clause as the "ATEL cure proposal."

6                 The bottom whereas clause on page 3 of the stipulation  
7 and order also refers to a limited objection of ATEL Leasing  
8 Corporation of America to notice of assumption and assignment  
9 with respect to certain executory contracts or unexpired leases  
10 to be assumed and assigned to Parnassus II, LLC, docket number  
11 18402 which is defined in that clause as the "assumption and  
12 assignment objection."

13                 The last whereas clause states that the debtors and  
14 ATEL have reached an agreement to settle and resolve the ATEL  
15 cure proposal -- that is the defined term relating back to the  
16 March 5, 2008 pleading -- and the assumption and assignment  
17 objection -- that's the, again, the defined term relating back  
18 to the July 17th, 2009 pleading. That is, the whereas clauses  
19 refer to an agreement to settle the matters set forth in those  
20 two pleadings by ATEL.

21                 The operative provisions of the agreement provide  
22 first, in paragraph 1, that the cure amount for contract number  
23 450140635 shall be \$13,699.83. Paragraph 2 provides that upon  
24 entry of this stipulation, the debtors shall grant ATEL an  
25 allowed administrative claim in the amount 21,750 dollars,

Page 58

1 which shall be paid in accordance with the terms of the  
2 modified plan. That is, paragraph 2 does not refer to the cure  
3 of the amounts owing under contract number D450140635, which is  
4 dealt with in paragraph 1 of the stipulation, but rather, the  
5 allowance of an administrative claim, which, based, in light of  
6 the contract interpretation principles I've just recited, must  
7 cover something other than the cure claim, or else it would  
8 have been dealt with in paragraph 1.

9 Paragraph 3 then states that ATEL hereby acknowledges  
10 that the cure payment of \$13,699.83 and the payment of \$21,750  
11 on account of ATEL's allowed administrative claim, together,  
12 the payments are in full satisfaction of all amounts asserted  
13 in the ATEL cure proposal and assumption and assignment  
14 objection. I should note that the amounts asserted in the ATEL  
15 cure proposal and in the assumption and assignment objection  
16 refer to, among other things, post-petition amounts owing under  
17 executory contracts between DPH's predecessor, the Delphi  
18 debtors, and ATEL or that were assigned to DPH's predecessors  
19 for post-petition amounts owing well in excess of the amounts  
20 asserted in the administrative claim, and that the amounts  
21 asserted in the administrative claim are for amounts under  
22 those same contracts, the two leases referred to in the ATEL  
23 cure proposal and in the proof of administrative claim and in  
24 ATEL's response and supplemental response to the objection to  
25 that claim. Thus, in the first sentence of paragraph 3 of the

Page 59

1 stipulation, ATEL acknowledges that the roughly 35,000 dollars  
2 of cure payment and allowed administrative claim shall be in  
3 full satisfaction of all amounts asserted in the ATEL cure  
4 proposal, including, I believe, the amounts asserted in that  
5 proposal which include amounts not only for contract number  
6 D450140635 but also for amounts under contracts that have not  
7 been assumed by the Delphi debtors, since the ATEL cure  
8 proposal included those contracts.

9 Paragraph 3 goes on to state that ATEL hereby waives  
10 any and all rights to assert against any and all of the debtors  
11 that the claims asserted in the ATEL cure proposal and  
12 assumption and assignment objection are entitled to any  
13 treatment other than set forth herein. Again, that sentence is  
14 not limited to cure, but instead refers to claims and refers to  
15 treatment, as opposed to cure. In the next sentence of  
16 paragraph 3, the parties agreed that the ATEL releasing parties  
17 further "release and waive any right to assert any other claim,  
18 cause of action, demand, lien, or liability of every kind and  
19 nature whatsoever, including those arising under contract,  
20 statute or common law, whether or not known or suspected at  
21 this time, which relate to the ATEL cure proposal or assumption  
22 and assignment objection" [and I'll note there, before  
23 continuing to read the rest of the passage, that "relate to" is  
24 broader than -- the phrase "which relate to" is broader than  
25 the language in the prior clause] "which relate to the ATEL

Page 60

1       cure proposal or assumption and assignment objection or which  
2       the ATEL releasing parties have, ever had, or hereafter shall  
3       have against the debtors based upon, arising out of, related to  
4       or by reason of any event, cause, thing, act, statement, or  
5       admission occurring before the date of the stipulation."

6               Paragraphs 4 and 5 then provide that the assumption  
7       and assignment objection and the ATEL cure proposal are  
8       withdrawn with prejudice. And paragraph 6 then states that  
9       "any claims arising after the date of the stipulation or  
10      relating to outstanding post-petition obligations that are not  
11      yet due and payable in connection with ATEL contracts being  
12      assumed by the debtors and assigned to applicable buyers shall  
13      either be paid in the ordinary course or subject to the  
14      procedures set forth in the modified plan for the payment of  
15      admin claims."

16               I believe that a fair reading of the foregoing  
17      provisions makes it clear that the stipulation and order on its  
18      face addresses not only amounts that would need to be paid as  
19      cure under Section 365 of the Code, but also all amounts  
20      asserted in the ATEL cure proposal, including in respect of  
21      contracts addressed in that proposal that were never assumed by  
22      the debtors, that it addresses all claims asserted in the ATEL  
23      cure proposal -- again, notwithstanding the fact that the  
24      debtors have not assumed all of the contracts asserted in the  
25      ATEL cure proposal -- any other claims related to -- and again,

Page 61

1 that phrase, "related to", is a broad phrase in the ATEL cure  
2 proposal -- or any other claims that ATEL and the ATEL  
3 releasing parties had or shall have arising before the date of  
4 this stipulation, which is again, October 7th, 2009. The  
5 administrative expense claim form was dated July 10th, 2009, so  
6 clearly the claims asserted in that administrative expense  
7 claim form arise prior to the operative date of the stipulation  
8 and order.

9 It is asserted by ATEL that notwithstanding the  
10 foregoing, the agreement, that is, the stipulation and order,  
11 is ambiguous because the Court could fairly construe that it  
12 nevertheless applies to cure claims, and in particular, ATEL  
13 cites cases in support of the general proposition that where a  
14 general release is given in a commercial dispute, although a  
15 court is less likely to find such broad language inadvertent or  
16 unintended, where the document includes recitals or other  
17 language indicating an intention to settle a narrower dispute  
18 than the claims arguably encompassed in the general release,  
19 the scope of the release is ambiguous, and therefore, parol  
20 evidence is admissible and summary judgment is inappropriate.  
21 See again, *In re: Rickel & Associates, Inc.*, 272 B.R. at 85-86  
22 and the cases cited therein. I don't disagree with that  
23 proposition.

24 However, I believe that in addition to the general  
25 release that appears in the last clause of paragraph 3, it is

Page 62

1 clear from the context and plain language of the agreement that  
2 the parties intended to settle more than the cure amount to be  
3 paid in respect of contract number D450140635, and therefore, I  
4 believe that the ambiguity asserted by ATEL is not, in fact, a  
5 true ambiguity. The recital provisions make it clear, I  
6 believe, that the parties are not resolving simply the cure  
7 amount owing in respect of that contract, but, rather, they are  
8 resolving on the terms of the agreement the issues that are  
9 raised in the ATEL cure proposal -- a defined term -- and the  
10 assumption and assignment objection. This is clear, also, and  
11 more importantly, from the operative provisions of the  
12 agreement, which, as I noted, have two different paragraphs,  
13 one dealing with the cure in respect of the specific contract  
14 and in the second, paragraph 2, providing for an allowed  
15 administrative claim which is not tied to any particular  
16 agreement that is to be assumed or not. Moreover, again, as  
17 I've noted, even before one gets to the general release at the  
18 end of paragraph 3 of the stipulation and order, the parties  
19 have provided that ATEL waives its rights in respect of amounts  
20 asserted and claims asserted and claims relating to the ATEL  
21 cure proposal which, again, asserted amounts owing and claims  
22 in respect of post-petition amounts under contracts that were  
23 not assumed by the Delphi debtors.

24 The only language, then, that arguably creates an  
25 ambiguity is the title of the stipulation and order which

Page 63

1 states "Stipulation and Agreed Order Resolving Objection of  
2 ATEL Leasing Corporation to Notice of Assumption and  
3 Assignment." However, it's perfectly consistent with that  
4 title that the parties agreed to resolve the objection to  
5 notice of assumption and assignment by dealing not only with  
6 the cure amount owing in respect of the claim to be assumed and  
7 assigned -- the contract to be assumed and assigned, that is  
8 contract D450140635 -- but also the other issues raised by ATEL  
9 in the ATEL cure proposal and assumption and assignment  
10 objection, including the post-petition amounts alleged to be  
11 owing by ATEL under other contracts that were not assumed by  
12 the Delphi debtors.

13 The agreement, therefore, I believe, does not fall  
14 into the exception noted in the Rickel case or in the cases it  
15 cites (which I will note, also, involved situations and  
16 recitals that were far more clearly in conflict with the  
17 general release provided, and, in fact, in one case, would have  
18 -- if not found to be narrowing the general release, have meant  
19 that the parties would have agreed to a release that was  
20 unlawful.).

21 Consequently, I believe that the intention of the  
22 parties is set forth in the plain terms of the stipulation and  
23 agreed order and that, therefore, this matter is appropriate  
24 for resolution at this stage of the claim objection process  
25 without the need to consider parol evidence, and in fact with

Page 64

1 the obligation not to consider such evidence since the issue is  
2 one involving the interpretation of agreement which is  
3 unambiguous by its terms and, therefore, an issue that is a  
4 question of law. See Arcadian Phosphates, Inc. v. Arcadian  
5 Corp., 884 F.2d 69, 73 (2d. Cir 1989) and Metropolitan Life  
6 Insurance Company v. RJR Nabisco, Inc., 986 F.2d 884, 889 (2d.  
7 Cir 1990).

8 So in light of that, I will sustain the debtors'  
9 objection to the administrative expense claim.

10 MR. TULLSON: Thank you, Your Honor.

11 THE COURT: You should e-mail an order to chambers  
12 consistent with my ruling; you should copy in Mr. Pfeiffer on  
13 that e-mail.

14 MR. TULLSON: Yes, Your Honor.

15 Your Honor, the final matter on today's claim agenda  
16 is this matter number 12, the sufficiency hearing regarding the  
17 claim of Kaaren Washington, proof of administrative claim  
18 19572. Neither Ms. Washington nor the Mississippi Workers'  
19 Compensation Individual Self-Insure Guaranty Association has  
20 alleged any facts --

21 THE COURT: Right.

22 MR. TULLSON: -- much less plausible facts in support  
23 of their claim. Moreover, the reorganized debtors conducted  
24 their own independent investigation regarding this claim and  
25 has concluded that it is without merit.

Page 65

1                   THE COURT: I've dealt with several of these similar  
2 claims in the past, and I will grant the objection -- in the  
3 past in this case -- and I'll grant the objection on the same  
4 basis --

5                   MR. TULLSON: Thank you.

6                   THE COURT: -- that it was incumbent upon the  
7 claimant, in light of the bare bones nature of the claim, to do  
8 more in light of the debtors' objection than they have done.  
9 So you can submit an order on that.

10                  MR. TULLSON: We will do so.

11                  THE COURT: Okay.

12                  MR. TULLSON: And that concludes the matters on for  
13 today's hearing.

14                  THE COURT: Thank you.

15                  (Whereupon these proceedings were concluded at 12:33 PM)

16

17

18

19

20

21

22

23

24

25

1

2 I N D E X

3

4 RULINGS

5

Page Line

6 Reorganized Debtors'	15	15
7 motion for Order		
8 Resolving Outstanding		
9 Objections to Cure of		
10 Material Supply		
11 Agreements and Cure		
12 Proposals for Certain		
13 Executory Contracts and		
14 Unexpired Leases Granted		
15 Johnson Controls' Motion	38	13
16 for an Order Compelling		
17 DPH Holdings to Comply		
18 with the Transfer Agreement		
19 Relating to Transfer of		
20 Delphi's New Brunswick		
21 Battery Facility to Johnson		
22 Controls, Inc., for		
23 Adequate Assurance of		
24 Financial Ability to		
25 Perform under Transfer		

1 Agreement Denied without  
2 Prejudice  
3 Sufficiency Hearing 64 6  
4 Regarding Claim of ATEL  
5 Leasing Corporation as  
6 Objected to on the  
7 Reorganized Debtors'  
8 Forty-Sixth Omnibus  
9 Objection Pursuant to 11  
10 U.S.C. Section 503(b)  
11 and Fed. R. Bankr. P.  
12 3007 Sustained  
13 Sufficiency Hearing 64 24  
14 Regarding Claim Filled  
15 by the Mississippi Workers'  
16 Compensation Individual  
17 Self-Insurer Guaranty  
18 Association on Behalf of  
19 Kaaren D. Washington as  
20 Objected to on the Reorganized  
21 Debtors' Forty-Sixth  
22 Omnibus Objection  
23 Pursuant to 11 U.S.C.  
24 Section 503(b) and Fed.  
25 R. Bankr. P. 3007 Granted

Page 68

1

2 C E R T I F I C A T I O N

3

4 I, Dena Page, certify that the foregoing transcript is a true  
5 and accurate record of the proceedings.

6

7 **Dena Page**

Digitally signed by Dena Page  
DN: cn=Dena Page, c=US  
Reason: I am the author of this document  
Date: 2010.12.07 16:33:08 -05'00'

8

9 DENA PAGE

10

11 Veritext

12 200 Old Country Road

13 Suite 580

14 Mineola, NY 11501

15

16 Date: November 22, 2010

17

18

19

20

21

22

23

24

25